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October 16, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Dear Ms. Salas:

Attached for filing in the referenced docket, pursuant to the procedural orders in this proceeding, FCC 98-188 (released August 6, 1998), and DA 98-1624 (rel. August 12, 1998), on behalf of Qwest Communications Corporation ("Qwest"), are the original and four copies of Qwest's reply comments.

We have also submitted under separate cover a copy of the reply comments to Judy Boley and a copy of the reply comments and a diskette containing the reply comments to Janice Myles of the Common Carrier Bureau and to International Transcription Services.

Please contact me if you have any questions.

Respectfully submitted,

Linda L. Oliver

Linda L. Oliver
Counsel for Qwest Communications Corporation

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

REPLY COMMENTS OF QWEST COMMUNICATIONS CORPORATION

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October 16, 1998

SUMMARY

Separate Affiliate Issues

The ILECs complain bitterly about the inefficiencies of establishing a separate subsidiary for the provision of advanced services. What they do not appreciate, however, is that those inefficiencies are nothing compared to the problems faced by unaffiliated CLECs, who depend on the ILECs' network facilities to provide competing local exchange service. Unaffiliated CLECs, moreover, must deal with an unfriendly competitor, not a sister company. No one is forcing a separate affiliate structure on the ILECs, moreover. They may choose to keep the efficiencies of integrated operations in exchange for remaining subject to the Act's market-opening requirements. The Commission must keep these factors in mind as it evaluates the parties' views on the proper structure of an unregulated separate advanced services affiliate.

Even many ILECs appear to agree that some degree of separation is necessary to establish that an ILEC affiliate is not an ILEC within the meaning of Section 251(c) and 251(h) of the 1996 Act. Most of the non-ILEC commenters believe that the Commission's proposed Section 272-style affiliate is not sufficiently separate to permit the Commission to treat the affiliate as a non-ILEC. Many commenters also point out that Section 272, which deals with interLATA services, has nothing to do with local exchange service or with either Section 251(c) or

Section 251(h), and is therefore not a sufficient test for separateness under Section 251(h). In fact, Section 272 assumes an RBOC *already has complied* with Section 251(c) -- not that the RBOC will be allowed to *avoid* compliance with that Section.

The Commission should disregard the ILECs' requests to have the Commission create a weak separate affiliate, and instead should strengthen the affiliate provisions it proposed NPRM. Many commenters support some of the same additional provisions that Qwest advanced in its initial comments, including a prohibition on affiliate ownership of local facilities, a prohibition on affiliate resale of ILEC retail services, a prohibition on joint marketing, and a requirement of partial public ownership in the affiliate.

The Commission should reject the ILECs' attempts to describe these safeguards as "efficiencies" that they have a right to. Instead, the Commission should recognize that these and other measures as essential to ensuring that the ILEC affiliate actually is treated and behaves as if it were an unaffiliated CLEC -- the Commission's stated goal in making the separate affiliate proposal in the first place.

The Commission also should reject the ILECs' pleas to be allowed to transfer their advanced network capabilities to the affiliate free from Section 251(c) obligations. This would be contrary to the Non-Accounting Safeguards Order and would permit the ILECs to deprive competitors of significant assets that were acquired when the ILEC was an integrated operation.

Network Element and Collocation Issues

The Commission should make it clear that Section 251(d)(2) does not provide the basis for exempting ILECs from making available their advanced network capabilities to requesting carriers. The Commission and the Eighth Circuit already have established that the term "impair" in that section does not mean, as the ILECs suggest, that a competitor does not have a right to a network element simply because it is possible for the competitor to duplicate that element itself.

The record already established in this case makes it clear that competitors of all stripes absolutely need access to all the advanced capabilities of the incumbent LEC network. National rules are essential in order to achieve the vigorous, competitive, broad-based deployment of advanced services.

The Commission should establish new national minimum standards for collocation and for advanced services network elements. These standards should incorporate the best practices from the state proceedings, and should be technology neutral to prevent regulatory gaming by ILECs as technology evolves. The ILECs, of course, advocate sticking with the present rules. They would prefer to force competitors to litigate every issue in every state, thereby delaying competition as much as possible -- contrary to the intent of Section 251(c) and Section 706. The *de minimis* level of local competition throughout the nation today highlights the need

for further Commission action and underscores the folly of following the ILECs' proposed course.

Qwest strongly supports the detailed collocation proposals made by CompTel, ALTS, Intermedia, and many others regarding cageless collocation, shared collocation, and other pro-competitive practices. These proposals reflect the results of extensive state collaborative proceedings and standard practices between unaffiliated companies in a competitive environment, and should help speed the widespread deployment of advanced services. In particular, Qwest joined numerous other commenters in asking the Commission to remove the out-dated restriction on collocation of switching and other multifunction equipment. The plain language of the statute supports removal of the restriction, and deployment of efficient advanced services networks will be greatly hampered by continuation of the ban. Further, Qwest notes that the ban provides a considerable competitive advantage to the ILECs, who are themselves under no such restriction.

Qwest also joins the majority of commenters in suggesting that the Commission identify new network elements for the provision of the advanced services. The Eighth Circuit has clearly affirmed the Commission's authority to define what facilities, functions, and capabilities are to be included as a network element. In particular, the Commission should define a new "advanced services network element" whose functionality is akin to the "permanent virtual connections" used by the ILECs to provide a dedicated pathway to an ISP. A

requesting carrier purchasing the advanced network element would obtain the full functionality of that connection, and not simply the service provided to the ISP.

By identifying a network element that provides the transmission from the customer premises to a point on the competitive provider's network (at which point it would then have to be combined with other elements of the provider's network in order to provide a telecommunications service), the Commission would also avoid many of the technical and feasibility issues that many commenters identified with respect to providing competitive advanced services to customers served via a Digital Loop Carrier (DLC). The majority of new loops being deployed today use DLC technology, so it is critical that the Commission identify new network elements that prevent the ILECs from shielding customers from competition.

In addition, the Commission should identify as a network element the packet equivalent to shared transport in the circuit-switched world, as several commenter propose. It should also clarify that, in general, network elements (including the loop and interoffice transport) include the associated electronics. Qwest also supports many of the other network functionalities identified by other commenters as necessary to provide competing advanced services.

Qwest joins several commenters in urging the Commission to end the uncertainty that presently surrounds CLEC access to dark fiber. The ILECs have deployed large amounts of fiber in their local networks, much of which is not being

used. This dark fiber should be made available as a network element to competitors for both local loops and interoffice transport. At the same time, the Commission should also clearly affirm that ILECs are obligated under Section 251(c)(2) to provide optical-to-optical interconnections.

LATA Boundary Modifications

The Commission should reject the pleas of the ILECs to obtain substantial interLATA relief through the inappropriate vehicle of granting LATA boundary modifications. Instead, the Commission should adhere to its precedent in granting those requests. There are many alternative sources of high-capacity interLATA services; it is unnecessary to undo Section 271 in order to meet customers' needs.

Resale of Advanced Exchange Access Services

Qwest agrees with the Commission's proposal to treat advanced exchange access services provided primarily to non-telecommunications carriers as subject to Section 251(c)(4). This result is required by the plain language of that section, and nothing the ILECs have said would undermine that conclusion.

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REPLY COMMENTS OF QWEST COMMUNICATIONS CORPORATION

Qwest Communications Corporation ("Qwest") hereby respectfully submits its comments in reply to the initial comments filed on September 25, 1998, in response to the Commission's August 7, 1998 Notice of Proposed Rulemaking in the referenced docket. 1/

I. THE ILECS' OWN ARGUMENTS PROVE THAT IF BROAD-BASED ADVANCED SERVICES COMPETITION IS TO DEVELOP, ACCESS TO ILEC ADVANCED NETWORK CAPABILITY WILL BE ESSENTIAL.

The ILECs complain bitterly about the inefficiencies of establishing a separate subsidiary for the provision of advanced services and investment in

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1/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, released August 7, 1998 ("Advanced Services Order" and "Advanced Services NPRM" or "NPRM").

advanced technology. 2/ They complain precisely because it would put them in the same position as unaffiliated CLECs -- a position that, by their own admission, would impede their ability to provide mass-market advanced services. US WEST complains, for example, that

> The NPRM's proposal would saddle incumbent LEC's data affiliates with the same array of economic disincentives to serve less well-off communities that new entrants face. . . . The new affiliate would be unable to rely on U S WEST's existing ubiquitous network and accordingly, like other CLECs, would be able to serve only lucrative, high-density markets. 3/

As U S WEST admits, for an entrant to successfully compete across a wide geographic area, it will be necessary to "rely on U S WEST's ubiquitous network." The Commission should not adopt a model that will ensure that many consumers will never have a choice of provider of advanced services. US WEST and other ILECs would like to shelter their advanced services investment in an affiliate because that would allow the ILECs to have much of the customer base to themselves -- and they will, in large measure, if the Commission's separate affiliate proposal is adopted.

2/ See, e.g., GTE at 37-38; U S WEST at 16-17; Bell Atlantic at 27-31.

3/ US WEST at 17.

The Commission's separate affiliate proposal, although well-intentioned, assumes incorrectly that CLECs can provide advanced services just as easily and as broadly as the ILECs can as long as they have access to ILEC unbundled conditioned loops. 4/ As Qwest pointed out in its initial comments, in order for competitors to be able to serve a broad base of customers, including residential customers and those in less dense areas, it will be essential for the ILECs to be required to provide access not just to "xDSL-capable loops" but also to all the advanced capabilities of the ILEC network, including loops with electronics (e.g. "xDSL-equipped" loops), interoffice data transport, packet switching, and so on. Any deregulated separate affiliate therefore must not include advanced local network capabilities. 5/

The ILECs would like the Commission to believe that there is something unique about advanced services that should enable the Commission to deregulate the ILECs' advanced capabilities without damage to the prospects for local competition. But, as Qwest pointed out in its initial comments, the ILECs' existing monopoly, ubiquitous circuit-switched network enables the ILECs to deploy

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4/ See Qwest Initial Comments at 8-18.

5/ ALTS at 30-32; CompTel at 9-14; AT&T at 33-37.

advanced services *over that network* in a manner, and at a scope, that no competitor can match. As U S WEST observes,

> The existence of circuit-switched facilities will permit economies of scope in the rollout of packet-switched technologies; the efficiencies of integrated provision of voice and data services, in turn, make it possible to provide affordable advanced services to all Americans. 6/

The basis for deregulation of the ILECs' advanced services network capabilities -- whether through a separate affiliate or otherwise -- is therefore false.

The ILECs also strenuously argue that a separate affiliate structure -- even the weak one proposed by the Commission -- would create numerous economic inefficiencies for the ILECs. 7/ What they fail to acknowledge in these discussions is that no one is *making* them operate on a separated basis. The ILECs can continue to operate as integrated companies, and as such, continue to abide by the requirements of the 1996 Telecommunications Act. If they decide, instead, voluntarily to create a fully separate subsidiary to house their advanced services activities, then, and only then, will they forfeit any "efficiencies" associated with integrated operations. Put differently, in the case of an ILEC, another name for "efficiency" is "incumbent monopolist advantage."

6/ US WEST at 16-17.

7/ See, e.g., Bell Atlantic at 22; US West at 16-17.

The inefficiencies that the ILECs complain of are nothing, moreover, compared with the inefficiency facing every CLEC attempting to compete with the ILECs in providing competitive advanced services. CLECs by definition must use the ILECs' facilities, in whole or in part, and thus by definition are completely structurally separated. Not only that, they are obtaining these essential network inputs not from a friendly affiliate but from a hostile competitor that knows the CLEC has little alternative to using the ILEC's network.

The ILECs argue that their competitors enjoy advantages of vertical integration that the ILECs themselves do not have. But that is not true with respect to the local exchange piece of the puzzle, which still largely belongs to the ILEC. 8/ For example, Bell Atlantic maintains that "separate subsidiary obligations are actually anticompetitive and hurt consumers by artificially imposing unnecessary costs on one of the competitors." 9/ What Bell Atlantic fails to recognize is that all of its competitors bear those "unnecessary costs" and more, because they are not even an ILEC affiliate. Bell Atlantic also fails to recognize that the goal of the separate affiliate is not to penalize the ILEC, but rather to give

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8/ Even the cable television companies, which have some ability to provide advanced services on an integrated basis, generally do not provide telephone service to their customers, and thus are not vertically integrated to the degree that the ILEC would be.

9/ Bell Atlantic at 22.

the ILEC an opportunity to *escape* ILEC-type regulation by creating an affiliate that, as much as possible, is put in the *same* position as an unaffiliated CLEC.

In determining what separate affiliate requirements to impose, therefore, the Commission must bear in mind that ILEC concerns about loss of integration efficiencies are irrelevant because the Commission's goal is to put the separate affiliate in the *same* position as an unaffiliated CLEC.

II. TO BE CONSIDERED A NON-ILEC, AN ILEC AFFILIATE MUST BE FULLY SEPARATE FROM THE ILEC.

Many commenters in this case, including some ILECs, agree that for an ILEC affiliate to be considered not-an-ILEC for Section 251(c) purposes, a degree of separation from the ILEC needs to be established. 10/ Many if not most of the non-ILECs also appear to agree that the separation proposed by the Commission -- which is founded on the design of the Section 272 interLATA affiliate -- is not sufficient to make the affiliate a non-ILEC under Section 251(h) and 251(c). 11/ They argue that additional requirements must be imposed to ensure that the affiliate is truly separate, taking issue with the Commission's unexplained reliance on Section 272.

10/ See, e.g., GTE at 27.

11/ See, e.g., CompTel at 27; ALTS at 17; MCI WorldCom at 29; AT&T at 20; Federal Trade Commission Staff Comments at 3.

As several parties correctly point out, Section 272 does not constitute an appropriate measure of the degree of separateness required to make an ILEC affiliate no longer an ILEC, for a number of reasons.

First, Section 272 has nothing to do with the question of when an ILEC affiliate should be considered an ILEC for Section 251(c) purposes and when an ILEC affiliate is considered a "successor or assign" under Section 251(h). 47 U.S.C. §§ 251(c), 251(h).

Second, Section 272 applies to RBOC provision of interLATA services, not local exchange or exchange access services. 12/ The interLATA market is already competitive and is characterized by multiple nationwide networks and multiple providers of cost-based, wholesale long distance capacity. In contrast, the network over which the ILECs would provide advanced services remains a virtual monopoly. For the ILECs to make their investments in advanced local network capabilities through an affiliate, and then escape Section 251(c) requirements to make that investment available to others, would leave competitors without effective alternatives.

Third, as many commenters point out, Section 272 is a corporate structure that provides additional safeguards for local competition *after* the RBOC

12/ See ALTS Comments at 8-9,

has already demonstrated that it has complied with all of the market-opening provisions of Section 251. 13/ But the Commission would propose to let the ILECs use this structure *before* demonstrating compliance with Section 251 or 271. Moreover, the Commission would create a structure that allows the ILECs to permanently escape ever satisfying Section 251(c) with respect to advanced services and network capability. Put differently, the Commission is using as a blueprint a structure that assumes the applicability of Section 251(c) to the local exchange network -- as evidenced by the Commission's holding in the Non-Accounting Safeguards Order that any facilities transfers to the affiliate would be subject to Section 251(c). 14/

At least some ILECs appear to acknowledge that merely creating an affiliate is not enough to exempt the affiliate from the obligations imposed on incumbent LECs under Section 251(c). 15/ Of course, they go on to observe that a set of minimal safeguards -- such as those set forth in the Competitive Carrier proceeding -- should be enough to establish the independence of an affiliate. What

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13/ See ALTS Comments at 8-9; MCI/WorldCom at 15; AT&T at 10-11.

14/ Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, released Dec. 24, 1998, at para. 309 ("Non-Accounting Safeguards Order").

15/ See, e.g., GTE at 27.

the ILECs overlook is the fact that these safeguards were not designed to convert the affiliate to a non-ILEC company, but rather just to limit cross-subsidy and discrimination, and to do so in an entirely different context.

In order to conclude that an ILEC affiliate can be exempted from the ILEC's statutory obligations, far more is required than the Section 272 requirements or the even weaker "safeguards" proposed by the ILECs. True "separateness" can only be achieved through structural separation and other measures that change the basic behavior and incentives facing both the ILEC and the affiliate. The Section 272 requirements, although helpful, simply do not accomplish this fundamental separation, as most of the non-ILEC commenters agreed. As discussed in the next section, the important task for the Commission is to identify those characteristics of a separate affiliate that would make it sufficiently separate to be deemed not a "successor or assign."

III. THE PROPOSED SEPARATE AFFILIATE MEASURES MUST BE SUBSTANTIALLY STRENGTHENED, NOT WATERED DOWN AS THE ILECS ARGUE.

In the Notice, the FCC stated that deregulation of an advanced services affiliate might be appropriate where the affiliate was "truly separate" from the ILEC. In its comments, Qwest identified the following minimum measures to ensure true separation of the affiliate:

- No ownership of local network facilities, equipment or capabilities

- No joint marketing
- No resale of ILEC's local exchange service by affiliate
- Partial public ownership
- Prohibition on joint ownership of equipment, buildings, and administrative services
- No sharing of corporate and brand names
- Pick and choose rights for CLECs
- Approval of compliance plan

Although a number of the ILECs appear to accept the notion that they must create some level of separation between themselves and their advanced services affiliate, 16/ most have advanced proposals that attempt to water down even further the already weak Section 272 separation requirements. 17/

The essence of the ILEC arguments is that a truly separate affiliate is not a viable option because the affiliate would be deprived of the benefits of integration with the ILEC. Rather than an affiliate that is "truly separate," the ILECs want an affiliate structure that is "separate, but not really separate." 18/

16/ Ameritech, for example, appears to be satisfied and willing to live with creation of a Section 272-type affiliate. Ameritech at 54.

17/ See, e.g., SBC at 5-13; Bell Atlantic at 26-31; GTE at 42-54.

18/ See, e.g., SBC at 11 ("At bottom, SBC must have an ability to manage the entire enterprise in order to help make a data affiliate a viable business unit").

What is particularly galling about the ILECs' attempts to water down the separate affiliate requirements is that the ILECs are complaining about the very inefficiencies that CLECs must live with every day in dealing with the ILEC (because the ILEC provides a part of virtually every CLEC's network). Moreover, these ILEC proposals are completely inconsistent with the Commission's goal -- creation of an affiliate sufficiently separate that it is not properly considered an ILEC under Section 251(h), and can therefore escape the market-opening obligations that otherwise would apply.

The Commission must not give in to the temptation to view its separate affiliate proposal as striking the correct balance merely because it is being attacked from both sides. While a separate affiliate proposal would take away statutory rights from CLECs --- rights essential to their very existence -- it would not deprive the ILECs of a thing. The CLECs have much to lose from a too-weak subsidiary. The ILECs, on the other hand, have everything to gain and nothing to lose, because they can always choose to stick with the status quo. Their comments should be viewed in that light.

Several of the more critical separate affiliate issues are discussed below, as examples of this problem.

Ownership of Network Facilities. Qwest and others demonstrated in their initial comments that it was critical that the ILECs unregulated data affiliate

not be permitted to own facilities used to provide telephone exchange and exchange access service. 19/ (The affiliate could use ILEC UNEs to provide such services, of course.) Only through that type of restriction would the ILEC affiliate be on the same footing as an unaffiliated CLEC with regard to access to those facilities.

The ILECs oppose the type of separation proposed by Qwest and instead have advanced proposals that would permit significant pieces of the local network to become unregulated, under even weaker separation safeguards than those proposed by the Commission. SBC, for example, supports a "safe harbor" that would permit the affiliate to acquire assets such as DSLAMs, packet switches and transport facilities, whether those assets are currently deployed by the ILEC, or acquired in the future under a contract between the ILEC and a third party. 20/ Similarly, U S West argues that the ILEC should be able to freely transfer "nonbottleneck" assets to an affiliate without that affiliate becoming a successor or assign. 21/

The problem with these ILEC proposals -- and indeed, with the Commission's proposal -- is that they would permit the ILEC to place critical

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19/ See Qwest at 40-41; AT&T at 33-37; Nextlink at 9-10; e.spire at 19-20; CompTel at 33-35.

20/ SBC at 6-8.

21/ U S West at 30-33.

network facilities and functionalities outside the scope of the market-opening provisions of Section 251(c). For example, permitting an ILEC to invest in DSLAM equipment through an unregulated affiliate would force competing CLECs to collocate in each central office in order to provide broad-based advanced services in competition with the ILEC. As discussed above in Section I, and as many commenters concluded, it will not be possible for competitors always to be able to install their own DSLAM and other advanced services equipment. 22/ This is so in part because of the high cost of deploying and collocating such equipment in every central office and creating a duplicate transport network to each central office. It is also necessary to be able to employ the ILEC's advanced services capabilities because DLC technology may make it difficult for a CLEC to provide advanced services on the same basis as the ILEC, and because collocation space may run out in some central offices. In sum,

Joint Marketing. Qwest explained in its comments that permitting joint marketing between the ILEC and its deregulated affiliate would give the ILEC affiliate competitive advantages that are unavailable to unaffiliated CLECs and

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22/ E.g. MCI/WorldCom at 51-52; e.spire at 21.

would blur the borders between two supposedly separate enterprises. 23/ Similar concerns were expressed by a number of other commenters. 24/

The ILECs vigorously oppose any attempts to limit joint marketing between the ILEC and the advanced services affiliate. Bell Atlantic, for example, argues that a joint marketing prohibition "would duplicate customer acquisition costs and cause customer confusion . . . It makes no business sense to pursue such a strategy when none of these problems exist in the current structure." 25/ In other words, Bell Atlantic opposes the this type of restriction because it no longer would be able to take advantage of its local exchange monopoly, and instead would have to compete for customers on the same basis as unaffiliated CLECs.

Ameritech makes a comparable argument to Bell Atlantic with regard to the increased costs of fulfillment and delivery if joint marketing is not permitted, and it also suggests that a restriction on joint marketing would place Ameritech at a competitive disadvantage because its potential competitors would be permitted to offer bundled packages of services. 26/ This argument completely ignores the fact that an ILECs' competitors must capture a customer's business for all these

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23/ Qwest at 41-42.

24/ See, e.g., CompTel at 27; e-spire at 9-10.

25/ Bell Atlantic at 30.

26/ Ameritech at 54-55.

services, while the ILEC already has the most significant stick in the bundle -- the customer's local exchange business -- and is simply trying to sell an add-on service. This argument also ignores the fact that the affiliate can still create service packages -- it just must do so on the same basis as unaffiliated providers.

Resale/Virtual Collocation. SBC states that the ILEC affiliate should be accorded treatment that is equal to any other requesting carrier, no more or no less, with regard to issues such as purchase of UNEs, collocation and obtaining services for resale. 27/ GTE advances a similar argument. 28/ While this statement is correct in principle, SBC's argument ignores the fact that the ILEC affiliate is not similarly situated with unaffiliated CLECs with regard to service resale and collocation. With regard to resale, Qwest and others demonstrated in order to be truly separate under Section 251(h), the ILEC affiliate must be prohibited from reselling the ILEC's services. 29/ This restriction is necessary because the affiliate does not care what the nominal resale price is because the payment is simply a pocket-to-pocket transfer to its sister company. 30/

27/ SBC at 11.

28/ GTE at 51.

29/ See CompTel at 24; AT&T at 28-31; ICG at 14; e.spire at 18.

30/ See Qwest at 43; AT&T at 28-31.

Qwest also supports the proposal of several parties that the ILEC affiliate not be permitted to employ a virtual collocation arrangement with the ILEC. 31/ In virtual collocation, the ILEC maintains and operates equipment that is only nominally owned by the CLEC. If the CLEC is an ILEC affiliate, the potential for discrimination in favor of the ILEC affiliate is great, and much of the distinction between the integrated company and the affiliate structure would be eliminated. If the ILEC has run out of central office space and must therefore resort to virtual collocation, any equipment it installs and maintains for its affiliate (through virtual collocation) should be deemed to be subject to Section 251(c). Otherwise, the ILEC affiliate can use virtual collocation arrangements as a means to substantially subvert the separation mechanisms that underlie the Section 251(h) determination.

Partial Public Ownership. As Qwest explained in its comments, the affiliate resale problem discussed above is but one example of a larger problem: that prices paid by the ILEC affiliate to the ILEC are artificial and have no impact on the profitability of the enterprise as a whole. To address the anticompetitive incentives created by this situation, Qwest proposed that there be partial public ownership of the ILEC's advanced services affiliate. 32/ A broad range of

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31/ See ALTS at 25; AT&T at 31-33; e.spire at 32; Transwire at 17-18.

32/ See Qwest at 44-45.

competitive local exchange carriers, interexchange carriers, and the industry associations representing the competitive entrants, supported this type of requirement. 33/ These parties recognized that partial public ownership creates different incentives in the affiliate and creates reporting and fiduciary obligations that would not otherwise exist. No matter what other separation mechanisms the Commission requires, the public ownership piece must be in place for true separation to be present within the meaning of Section 251(h).

In sum, the Commission should reject the ILECs' suggestions for watering down the Commission's proposed separate affiliate requirements. Instead, the Commission should strengthen the separation requirements to make the affiliate "truly separate" from the ILEC, as recommended by Qwest and the majority of the non-ILEC commenters.

IV. SECTION 251(C) MANDATES THAT IF THE ILEC TRANSFERS LOCAL EXCHANGE FACILITIES TO A SEPARATE SUBSIDIARY, THOSE FACILITIES REMAIN SUBJECT TO SECTION 251(C).

Most of the non-ILEC parties that addressed the issue of facilities transfers to the affiliate agree that the Act and public policy prohibits the Commission from exempting transferred facilities from Section 251(c), even if the

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33/ See, e.g., CompTel at 22-24; ALTS at 18-21; Ad Hoc Telecommunications Users Committee ("Ad Hoc") at 24; Telecommunications Resellers Association ("TRA") at 31-32; Westel at 8-9; AT&T at 20-22; MGC at 35-37; ICG at 10.

Commission were to find that new advanced services investments made by the affiliate could be exempt due to the affiliate's non-ILEC status. 34/ The plain language of Section 251(h) provides that when an ILEC transfers or "assigns" local exchange assets to an affiliate, that affiliate becomes the ILEC's "successor or assign," as the Commission determined in the Non-Accounting Safeguards Order.

In Qwest's view, as discussed above and in its initial comments, the Commission lacks authority to exempt any affiliate from Section 251(c)'s requirements, especially to the extent the affiliate owns local exchange network capabilities. 35/ Qwest also argued that the Commission should impose, as one condition of an affiliate's non-ILEC status, that the affiliate not own local exchange network capabilities, since that is the hallmark of what it means to be an ILEC. 36/ As discussed above, many commenters agree with this general approach. There also is widespread agreement that the ILEC cannot transfer advanced services network facilities to the affiliate and thereby exempt those facilities from Section 251(c).

34/ E.g., AT&T at 33-37; ALTS at 6-7; CompTel at 33-35; US Xchange at 2; McLeod USA at 2; MCI/WorldCom at 7-8.

35/ Qwest at 22-28.

36/ Id. at 40-41.

As ALTS points out, ILECs routinely replace assets in their networks as they become technologically obsolete with more advanced technology. The Commission surely would not allow the ILECs to transfer this kind of investment to an unregulated separate affiliate, or to make that kind of investment through an unregulated affiliate. As ALTS puts it, the FCC's proposal regarding advanced services investment "is not different in our real world when the replacement of an asset is dictated by technological innovation in addition to physical deterioration." 37/

There also is no difference between "bottleneck" and "non-bottleneck" facilities under the Act, either under Section 251(c) or 251(h), despite the ILECs' contentions to the contrary. Congress did not attempt to determine what local exchange facilities would be expensive to duplicate, for which carriers, and where. Indeed, this would have been an impossible task.

Moreover, as discussed in Qwest's initial comments, there is nothing about advanced services technology that makes it any less of a needed network element from the point of view of a potential competitor. 38/ Anything in the local exchange can be duplicated, but not everything can be duplicated economically. The Commission should not presume to judge which investment is which, for whom,

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37/ ALTS at 6.

38/ Qwest at 10-12.

where, and when. GTE nevertheless suggests that somehow a transfer of "non-bottleneck" facilities ought to be treated differently under Section 251(h). 39/

The ILECs attempt to justify transferring facilities free from Section 251(c) by saying that they need these facilties in the affiliate (free from regulation) in order to operate efficiently. In objecting to the FCC's proposal that a "wholesale transfer" of advanced services facilities to the affiliate would mean that the transferred facilities would be subject to Section 251(c), U S WEST argues:

> In order to obtain the regulatory freedom that would justify the high costs of creating a separate affiliate, US WEST would be forced to have its affiliate duplicate US WEST's existing packet-switched network. Requiring carriers to expend scarce resources to duplicate facilities obviously would not assist in the rollout of advanced services to rural, high-cost areas. 40/

U S WEST apparently has no compunctions about the fact that its each of its advanced services competitors would have to duplicate the U S WEST packet network in order to provide advanced services. U S WEST wants to have its cake and eat it too.

Qwest also supports CompTel's view that transfer of any asset, whether facilities, equipment, customer accounts, employees, or brand name,

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39/ GTE at 28.

40/ US WEST at 29.

cannot be permitted consistent with the affiliate's non-ILEC status. The Commission's test for the separate affiliate as one that is "functioning like any other competitive LEC" 41/ cannot be met if the ILEC can transfer assets to the affiliate. As CompTel correctly observes, "[s]ince other competitive LECS cannot purchase such assets from the ILEC to begin their operations, it would be unfair to provide the ILEC's advanced services affiliate with this headstart." 42/

V. THE ILECS' ATTEMPTS TO OBTAIN ADVANCED SERVICES FORBEARANCE ON OTHER GROUNDS MUST FAIL

A. Section 251(d)(2) Does Not Provide a Basis for Denying Competitors Access to Network Elements Needed to Provide Advanced Services.

A number of ILECs make the argument that the FCC should encourage the development of advanced services by ruling that unbundling and resale requirements do not apply to facilities and equipment used to provide these services. In addition to rearguing the points they lost in the Advanced Services Order, the ILECs advance other grounds in an effort to accomplish the same end. 43/

41/ Advanced Services NPRM at ¶ 104.

42/ CompTel at 34.

43/ SBC and Bell Atlantic have sought reconsideration of the Advanced Services Order, and another RBOC (US WEST) has sought judicial review of the Order. U S WEST v. FCC, D.C. Cir. No. 98-1410 (filed September 2, 1998). Qwest filed an opposition to the reconsideration petitions on October 5, 1998, which we incorporate

Bell Atlantic, for example, suggests that under Section 251(d)(2) "equipment and facilities used to provide advanced services do *not* need to be unbundled where failure to provide a competitor with access to those elements will not 'impair' its ability to provide services." 44/ Similarly, BellSouth argues that the Commission "*must* also refrain from requiring unbundling where the ILEC's failure to provide requested network elements will not impair the ability of the requesting carrier to provide its services." 45/

The argument advanced by Bell Atlantic and BellSouth completely mischaracterizes the statutory standards to be applied by the Commission in determining which elements must be unbundled. Section 251(d)(2) provides that the Commission "shall consider, at a minimum, whether--

> (A) access to such network elements as are proprietary in nature is necessary; and
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> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 46/

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by reference in response to the RBOC arguments presented here against the Commission's decisions in the Advanced Services Order.

44/ Bell Atlantic Comments at 19 (emphasis in original).

45/ BellSouth Comments at 25 (emphasis added).

46/ 47 U.S.C. § 251(d)(2).

Through this language, Congress gave the Commission broad discretion to require unbundled access to network elements in a manner consistent with the pro-competitive purposes of the 1996 Act. As the Eighth Circuit recently stated in its decision upholding the FCC's requirement that ILECs provide access to shared transport, Congress "invested the FCC with authority to determine which network elements should be made available to new entrants on an unbundled basis. Section 251(d)(2) limits the FCC's authority in this regard only insofar as it requires the FCC to consider two factors 'at a minimum' as it makes this decision." 47/

The statute requires the Commission to "consider" two specific factors, but it does not, as Bell Atlantic and BellSouth suggest, mandate that these are the only factors that the Commission can consider, or that either factor must be satisfied as a prerequisite to requiring that a network element be unbundled. As noted by U S West, "Section 251 expressly allows consideration of other factors in addition to the 'necessary' and 'impair' criteria." 48/ Given the plain language of the statute, as interpreted by the Eighth Circuit, there is no merit to the argument that

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47/ Southwestern Bell v. FCC, 153 F.3d 597, 601 (8th Cir. 1998) (citations omitted).

48/ U S West Comments at 9. Although this is a proper interpretation of the statute, the Commission should give no weight to U S WEST's argument that unbundling requirements would create a disincentive for investment by the ILECs.

network elements used in providing advanced services must be unbundled only if the failure to offer unbundled access impairs the CLEC's ability to provide service.

Furthermore, in considering whether a failure to provide access to the network elements used in providing advanced services would "impair" the ability of CLECs to provide service, the Commission should continue to apply the standard articulated in the Local Competition Order -- whether the quality of the CLECs' service would decline or the cost of providing the service rise in the absence of the requested element. 49/ This pro-competitive interpretation of Section 251(d)(2)(B) already has been affirmed by the 8th Circuit twice -- in Iowa Utilities Board v. FCC, and more recently in Southwestern Bell v. FCC. 50/

The interpretation of Section 251(d)(2)(B) adopted by the Commission and affirmed by the 8th Circuit has been followed at the state level as well. For example, in a recent decision requiring Bell Atlantic to provide dark fiber on an unbundled basis, the New Hampshire Public Utilities Commission stated that it

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49/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325, released August 8, 1996, 11 FCC Rcd 15499, at ¶¶ 285-86 (1996), aff'd in part and rev'd in part, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted. ("Local Competition Order") (rejecting ILEC argument that unbundling only required when "failure to do so would prevent a carrier from offering a service" or "if they can obtain elements from another source").

50/ See Iowa Utilities Board v. FCC, 120 F. 3d 753, 810-12 (8th Cir. 1997); Southwestern Bell, 153 F.3d at 604, n.6.

was "uncontroverted" that "the impairment standard is satisfied if without access to Dark Fiber the quality of [CLEC's] service would be lower or the cost of [CLEC's] service would be higher." 51/ Further, the NHPUC found that its analysis "need not include an investigation as to whether [CLEC] has an alternate source for the network element. The Eighth Circuit determined that generous unbundled access to network elements is necessary to expedite the arrival of competition." 52/ The Public Utilities Commission of Ohio similarly concluded that dark fiber should be provided as an unbundled network element because the failure to do so would impair the ability of CLECs to provide service. 53/

In sum, Section 251(d)(2) provides no basis for the Commission to conclude that competitors do not have a right to employ the advanced capabilities of the incumbent LEC network as network elements. As discussed below in Section VI, moreover, the Commission should specifically identify advanced services

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51/ See Re Bell Atlantic, DE 97-229, Order No. 22, 942 (N.H. PUC May 19, 1998).

52/ Id.

53/ Re MCI Telecommunications Corp., Case No. 96-888-TP-ARB (Oh. PUC Feb. 20, 1997); see also MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 7 F.Supp. 2d 674, 680 (E.D.N.C. 1998) (remanding decision of state commission not to require unbundling of dark fiber so that commission could conduct impairment analysis and stating that "restrictions on access are presumed to be unreasonable and the burden to justify such a restriction falls squarely on the ILEC").

network elements to ensure that the market for advanced services will be competitive.

B. Other Bases for Limiting Section 251(c) Applicability to Advanced Services Must Be Rejected.

Bell Atlantic also argues that the Commission has the authority to exempt ILECs from the Section 251(c)(4) resale requirement, despite the Commission's clear determination that advanced services are fully subject to Section 251(c) market-opening obligations. Bell Atlantic defends this limitation on resale as a "not unreasonable" restriction on resale because its offering of "mass market" advanced services promotes the goals of Section 706. 54/ Bell Atlantic does not explain how prohibiting resale promotes competitive advanced services markets, nor does it explain how its reading of "reasonable restrictions" is consistent with the Commission's prior interpretation of that phrase in the Local Competition Order. 55/

Bell Atlantic and other ILECs also argue that advanced services network capabilities should not be made available to competitors on the grounds that such capabilities can be duplicated by others. 56/ If this were the test for

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54/ Bell Atlantic at 18-20.

55/ Local Competition Order at ¶ 939.

56/ E.g., Bell Atlantic at 20; US WEST at 4-5.

availability of network elements, then nothing would be available as network elements. Every facility in the network can be duplicated -- albeit many at great and unnecessary expense. Instead, the Act contemplated that the CLECs would decide which network elements they needed and which they could provide themselves, making it possible for quick and efficient entry to take place while competitors constructed duplicate facilities where economically justifiable.

VI THE COMMISSION SHOULD USE THE CLEAR AUTHORITY PROVIDED BY SECTION 251 TO ESTABLISH NATIONAL STANDARDS TO IMPROVE COLLOCATION OPTIONS AND IDENTIFY ADVANCED SERVICES NETWORK ELEMENTS.

A. National Rules are Essential.

The Commission should establish new national minimum standards for collocation and for advanced services network elements. As in the Local Competition Order, state commissions should be permitted to expand upon these minimum standards, but it is essential that the Commission act in this proceeding to establish new rules in order to promote the competitive provision of advanced services in a "reasonable and timely fashion."57

Virtually all of the commenters, other than ILEC commenters, supported the establishment of such national rules.58 The ILEC commenters took the position

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57 Section 706(b) of the Telecommunications Act of 1996 (47 U.S.C. 157 note).

58 Comptel at 38 and 47; Intermedia at 46; CWI at 9; GSA at 14 and 17; AT&T at 72; e.spire at 21 and 33; ALTS at 41-42 and 56.

that no further rules were needed, and that to the extent any problems exist they can be addressed through case-by-case negotiation or state arbitration proceedings.59 Continuing the status quo, as the ILECs argue, is not an option if the Commission seeks to achieve the goals of the 1996 Act, and in particular Section 706 of that Act. The *de minimis* level of local competition throughout the Nation today, over two and a half years after enactment of the 1996 Act, speaks to the inability of the current rules to enable the development of widespread competition, for either conventional or advanced local exchange services.

Instead, the Commission should exercise its clear authority under Section 251 to mandate new minimum standards for collocation and to define new network elements for the provision of advanced services. State commenters generally support such an approach as long as States retain the flexibility to go further to promote competition.60

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59 GTE at 56 and 80; SBC at 14 and 30; Ameritech at 32-35.

60 Illinois Commerce Commission at 8 and 13; Minnesota DPS at 17.

B. The Commission Improve Collocation Options.

Qwest strongly supports that proposals made by CompTel, ALTS, Intermedia, the General Services Administration (GSA), and others61 with respect to improving collocation options and streamlining the collocation process under Section 251(c)(6).62 The Commission should adopt national standards that incorporate the progress made by various states on these issues in order to reduce litigation, provide certainty for both ILECs and CLECs, and to expedite the competitive provision of local exchange services.

The Commission should disregard the ILECs' arguments that the collocation rules are fine as they are. 63/ The consistent experience of competitors throughout the country has been that those rules are not adequate to promote widespread competition. As Qwest illustrated in its initial comments, collocation costs alone can result in a large percentage of central offices nationwide being too expensive to serve on a competitive basis.64 The high costs and extensive difficulties of physical, caged collocation have been well-documented, and are

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61 CompTel at 40-45; ALTS at 47-54; Intermedia at 23-31; GSA at 13-14; e.spire at 21-30; AT&T at 78-91.

62 47 U.S.C. 251(c)(6).

63/ See SBC at 14; GTE at 60; Bell South at 45.

64 Qwest at 12-14.

inhibiting the growth of competition. 65/ (This is not to say, of course, that reducing collocation costs will obviate the need for access to all the advanced capabilities of the ILEC network, as discussed below).

As competition continues to develop, space will become even more limited, and alternatives to caged collocation will have to be developed in order to keep entry into the local market possible -- whether for circuit-switched or more advanced services. Users, such as the Ad Hoc Telecommunications Users Committee and the GSA, also support cageless collocation as a means to promote competition. 66/

Qwest also notes that there is strong support for requiring that collocated equipment only meet the NEBS level 1 standards with respect to safety.67 The Commission should prohibit ILECs from imposing additional requirements, and should permit a CLEC to use any non-NEBS level 1 compliant equipment that is used by any ILEC.

65/ See "Uncaging Competition: Reforming Collocation for the 21st Century", Comptel White Paper No. 2 (September 1998), which was filed as attachment B to Comptel's initial comments in this proceeding.

66/ Ad Hoc at 25; GSA at 13-14.

67 ALTS at 45; Sprint at 26; Illinois Commerce Commission at 9-10.

C. The Commission Should Require ILECs to Permit Collocation of Switching and Mult-function Equipment.

In the Local Competition Order, the Commission declined to order ILECs to permit the collocation of switching equipment, but "reserved the right to reexamine this issue at a later date if it appears that such action would further the achievement of the 1996 Act's procompetitive goals."68 The Advanced Services NPRM properly raised this issue for further comment,69 and the record clearly indicates that an overwhelming majority of commenters believe the Commission should revise their current rules.

Many commenters, both competitors and users, urged the Commission to permit collocation of switching and other multi-function equipment, supporting a position also taken by Qwest.70 This position is clearly consistent with the plain language the statute,71 and is essential to permit efficient network design, reduce

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68 Local Competition Order, ¶ 581.

69 Advanced Services NPRM, ¶ 129-130.

70 TRA at 39-40; ALTS at 43; CompTel at 38-40; Ad Hoc at 25-26; Allegiance at 3; PSINet at 15; Internet Access Coalition at 18; Paradyne at 7; Intermedia at 32; CIX at 24; GSA at 12-13; and CWI at 10-11.

71 Qwest at 52-53 (citing 47 U.S.C. §§ 153(47)(B) (telephone exchange service is a telecommunications service provided through a system of *switches*, transmission equipment, or other facilities...) and 47 U.S.C. 251(c)(2) (ILECs are obligated to allow interconnection for the transmission and *routing* of telecommunications service) (emphasis added)).

costs to consumers, and enable fair competition with the ILEC (which is under no such restriction with respect to its network).

The Commission should reject the position taken by SBC and GTE that the Commission has no authority to require collocation of switching equipment, or that the Commission's previous observation in the Local Competition Order regarding circuit-switched networks somehow binds the Commission in this proceeding. As the Commission itself noted, Section 251(c)(6) provides clear authority for the Commission to require collocation of equipment used for "interconnection for 'transmission and routing' of a telephone exchange service and exchange access' pursuant to section 251(c)(2)." 72/ Switches are used for the routing of telecommunications services, and are a means of interconnection between a competitor and ILEC network.

The ILEC interpretation of "necessary" is the same interpretation they advanced for that term in Section 251(d)(2) and other contexts. The Commission and the Eighth Circuit have both rejected such a narrow view of that term, accepting instead the view that "convenient, or useful" is more appropriate in the context of the competitive goals of the 1996 Act.73 The Commission should take the

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72/ Advanced Services NPRM at ¶ 126.

73 Local Competition Order, ¶ 282; Iowa Utility Board v. FCC 120 F. 3d 753, 811 (8th Cir. 1997).

same view here, especially in light of the anti-competitive impacts the continued prohibition will have on competitors' ability to deploy efficient networks in the same manner as an ILEC can.

In particular, Qwest agrees with the position taken by CompTel and Intermedia that no restrictions should be placed on the collocation of equipment, and that adoption of other collocation reforms will eliminate or significantly reduce any space exhaustion problems that otherwise might occur with the removal of the switching or enhanced services restrictions74.

To the extent that space exhaustion is a concern, both Qwest and Intermedia have suggested a limitation of 100 foot standard collocation cages.75 Further, as CompTel points out, adoption of cageless and shared collocation options should alleviate any space problems that might once have been a reason to prohibit collocation of switching and enhanced services equipment.76 Most importantly, the Commission should keep in mind that the ILEC faces no such restriction, so CLECs by definition will be at a competitive disadvantage if they are unable to locate multifunction equipment at the same efficient points in the network that the ILEC can.

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74 Comptel at 39; Intermedia at 35-36.

75 Qwest at 53; Intermedia at 36.

76 Comptel at 39.

D. The Commission Should Establish Advanced Network Elements to Promote the Deployment of Competitive Advanced Services.

Numerous commenters suggest that the Commission identify additional network elements for providing local exchange service in a packet-switched environment.77 Most were variations on a theme, but all supported certain basic concepts that Qwest also identified in its initial comments. Those basic concepts are:

1) Requesting carriers have the right to access the functionality and capability of the ILEC network, not just the equipment and facilities in that network;

2) The electronics necessary to transmit a customer's information are included as part of the network elements already identified by the Commission; and

3) The Commission should identify, pursuant to Sections 251(c)(3), 153(29), and 251(d), an advanced services network element defined as the network functionality that enables a competitive telecommunications carrier to transport, in a broadband digital format, the customer's information from the customer premises to the network of the competitive carrier.

These principles are essential to achieving the Commission's goal of promoting the widespread deployment of competitive broadband, advanced services capability to all Americans.

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77 ALTS at 80-87; Intermedia at 45-59; MCI/Worldcom 70-77; Comptel at 45-48; CIX at 26; PSINet at 9; AT&T at 44-50; e.spire at 38-46.

These principles also require that the definitions of network elements be technology neutral. Such neutrality is critical, because rapid evolutionary changes in network design and equipment will give ILECs a strong incentive to seek to get around their obligations if the network elements are defined in a technology specific fashion. As BellSouth acknowledged in its comments, the network will continue to evolve as technology changes:

> Not only will ADSL technology evolve, BellSouth and other ILECs continue to place fiber deeper into their networks. These placements include fiber-to the curb. As these fiber deployments expand, it is inevitable that advanced services will transition likewise to the fiber networks. Thus, any broad determinations that the Commission might make now relative to unbundling requirements for ADSL are unlikely to transition to fiber-based local loop technologies." 78/

Of course, Qwest draws a different conclusion from this trend than does BellSouth. BellSouth would have the Commission leave network unbundling requirements where they were in 1996; Qwest would have the Commission develop unbundling requirements that are flexible enough to accommodate evolution in technology. As we stated in our initial comments, competitors need access to all varieties of high-

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78/ BellSouth at 26.

capacity loops and interoffice facilities -- whether dark fiber, DS-1, DS-3, OC-N, or other transmission mediums. 79/

The Commission should adopt rules to implement these principles in its final order in this proceeding.

1. Advanced Services Network Element

The "advanced services network element" was given many different names in the comments submitted to the Commission.80 However, at the core of those comments is the concept that competitors must be able to purchase from the ILEC a network element that transports the customer's information from the customer premises to the network of the competitive carrier. Defined properly, in functional terms that are technology neutral, this network element could go a long way toward solving the myriad technical issues that many commenters (and the Commission itself) identified in connection with the provision of xDSL equipped or capable loops to customers served using a digital loop carrier (DLC) in a remote terminal.81 This "advanced services network element" is similar in functionality to the "permanent

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79/ Qwest at 64-68.

80 For example, "shared data channel" (CompTel at 45-47), "end to end broadband capability" (ALTS at 57), "extended link" (e.spire at 22 and Intermedia at 48-49).

81 MCI/Worldcom at 74; SBC at 44; Ameritech at 13; Bell South at 49.

virtual connections" that ILECs presently use to route traffic to a specific information service provider.82 However, the telecommunications carrier would be obtaining all of the functionality of the advanced services loop, unlike an ISP, which obtains from the ILEC a service that represents only a portion of that functionality.83

That the Commission has the authority to define such a network element is without question.84 Further, as noted by the Commission, Congress amended the definition of "telephone exchange service" to encompass new technologies. 85 Qwest strongly supports the Commission identifying as an advanced services network element the network functionality described in Qwest's initial comments and in CompTel's comments as the "shared data channel."86

The ILECs' own comments illustrate conclusively that further delay will result if the Commission does not define such a network element. SBC,

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82 Advanced Services NPRM at 42 & n.73; AT&T at 49; HAI at 88.

83 CompTel at 47 & n.80.

84 CompTel at 47-48; e.spire at 34 (citing Southwestern Bell Tel. Co. v. FCC 1988 WL 459536 (8th Cir. Aug. 10, 1998) ("Pursuant to section 251(d)(2), it is within the authority of the FCC to determine which of these network elements – the facilities, functions, or both – incumbent LECs must make available on an unbundled basis.")).

85 Advanced Services NPRM at ¶ 41 & n.71.

86 CompTel at 45-47.

Ameritech, and Bell South all admitted that it would not be possible to provide competitors with the ability to provide advanced services over unbundled loops for customers served by Digital Loop Carrier technology.87 MCI also agreed that this was a problem.88 Left uncorrected, this could mean that at least 20 percent of customers nationwide, and up to 50 to 70 percent of the customers in some areas, would be unable to receive advanced services on a competitive basis unless competitors built new facilities all the way to each customer premises.89 Again, the ILECs advance a specious interpretation of section 251(d)(2) – rejected by the FCC and the courts – as their only argument in opposition to the Commission's authority to identify new advanced services network elements.90

2. Packet Switching and Transport

A number of parties also discuss the need for requesting carriers to have access to the ILECs packet switching and transport capability. 91/ As Qwest

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87 Ameritech at 13; Bell South at 49; SBC at 44.

88 MCI/Worldcom at 74.

89 AT&T at 67 (citing 1998 BellCore estimate that 50-70 percent of new loops are served by DLC).

90 Local Competition Order, ¶¶ 282-287; Iowa Utililities Board v. FCC 120 F. 3d 753, 811 (8th Cir. 1997).

91/ AT&T at 96; MCI/WorldCom at 77; Comptel at 46.

observed in its initial comments, access to this capability is essential.92 Qwest supports adoption of the CompTel network element described as the "shared data transport." 93/

Even if CLECs are able economically to collocate and install their own DSLAMs in some central offices, the cost of providing transport to each of those central offices could be prohibitive. Just as for shared transport in the circuit-switched world, access to the transport provided in the ILEC's local packet network will be critical to the rapid deployment of competitive advanced services nationwide.

3. Electronics As Part of the Local Loop

There was also strong support for the position taken by Qwest and others that the network elements previously identified by the Commission in the Local Competition Order include the electronics necessary to provide transmission of the customer's information.94 Even GTE conceded that "the loop electronics are 'necessary' to offer advanced services."95 The only argument advanced by the ILECs to argue that the electronics should not be included was the argument,

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92 Qwest at 16-17.

93/ CompTel at 46.

94 Qwest at 65-66; AT&T at 46; e.spire at 41; Intermedia at 54-55; Local Competition Order, ¶ 380.

95 GTE at 103.

previously rejected by the Commission and the courts, that the electronics need not be provided because the competitor can obtain them elsewhere.96

4. xDSL "Capable" Loops without Electronics

The comments also highlighted the need for loops without electronics attached, so that competitors may attach their own electronics when it is economically and technically feasible to do so. However, as MCI, Bell South and Ameritech all pointed out, current technology may make it impossible in some cases for competitors to provide any service at all if the Commission grants competitors access only to loops without the electronics.97 In the interest of promoting competition and bringing new services as quickly as possible to consumers, Qwest and numerous other parties have urged the Commission to identify new network elements, in addition to the xDSL-capable loops already required under the Local Competition Order, that do not include transmission, multiplexing, and other electronics. In general, most commenters identified four types of transmission "capable," or "dark," loops.98 As discussed in the next section, Qwest and others would also add dark fiber loops to this list.

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96 Local Competition Order, ¶ 287; Iowa Utility Board v. FCC, 120 F.3d 753, 811 (8th Cir. 1997).

97 MCI/Worldcom at 74; Bell South at 49; Ameritech at 13.

98 AT&T at 45; MCI/Worldcom at 71-72; Intermedia at 53.

E. The Commission Should Clearly Identify Dark Fiber As a Network Element.

Qwest, Allegiance, and RCN Telecom all identified dark fiber as a critical network element that the Commission should require ILECs to provide under section 251(c)(3).99 At least two states have already taken this step,100 and the Commission would take a great stride toward promoting nationwide broadband services by adopting a similar ruling.

As the Commission itself noted in the Advanced Services NOI, ILECs are warehousing a tremendous amount of dark fiber.101 This fiber represents a significant, quantum increase in the bandwidth that can be made available to consumers, and represents part of the ubiquitous local exchange network that Congress sought to make available to competitors under Section 251(c)(3). The same economies of scale and scope apply with respect to fiber loops and trunks as apply to the copper counterparts deployed decades before. Making dark fiber available as a network element would be an important proactive step in furthering the goals of Section 706.

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99 Allegiance at 14-16; RCN Telecom Services, Inc. at 17-20; Qwest at 66-68.

100 See Re Bell Atlantic, DE 97-229, Order No. 22, 942 (N.H. PUC May 19, 1998) and Re MCI Communications Corp., Case No. 96-888-TP-ARB (OH PUC Feb 20, 1997).

101 Advanced Services NOI, ¶ 23 note 19.

Further, the Commission should make clear that dark fiber is also available as an unbundled network element for interoffice transport. Particularly in the case of high speed packet networks, fiber is the medium of choice for all telecommunications carriers today. As Qwest discussed in its initial comments, the cost of duplicating the interoffice transport network needed to reach a large number of central offices is prohibitive. 102 Providing dark fiber as a UNE for interoffice transport is essential to the widespread, competitive deployment of advanced services.

5. Optical Interconnection

There is also the need for clarification by the Commission of their rules requiring ILECs to provide direct interconnection of optical facilities. Qwest strongly supports the comments of Allegiance on this matter.103 To permit the ILECs to require optical signals to be converted to electrical ones in order to interconnect with their optical networks is to allow them to impair the quality of the competitors service, and clearly does not meet the statutory requirements of section 251(c)(2)(C).104 To the extent that any modification of the ILEC network is

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102 Qwest at 16-17.

103 Allegiance at 11-14.

104 47 U.S.C. 251(c)(2)(C) (requiring the ILEC to provide interconnection that is at least equal in quality to that which it provides to itself).

necessary to permit direct optical interconnection, the Commission and the court have both made it clear that such modification must be made to meet the requirements of the statute.

F. The Commission Should Reassert that the Full Functionality is Obtained with a Network Element, and Not Undermine This Concept By Requiring Loop Spectrum Sharing.

The Commission asked in paragraph 162 of the Advanced Services NPRM about shared use of the local loop spectrum. The comments in response to this question were mixed, with many competitive providers and ISPs supporting mandatory sharing of the loop spectrum.

Much as Qwest believes that such mandatory sharing could promote the competitive provision of advanced services, Qwest finds that it must agree with the position articulated by Comptel, Sprint, AT&T, PSINet, and several ILECs that mandatory sharing is not legally or practically possible.105 In particular, the Commission's Local Competition Order makes it clear that a competitor obtains the full functionality of a network element under Section 251(c)(3), without regard to whether or not the competitor actually uses all of that functionality.106 If this were not the case, endless practical problems would ensue with respect to billing,

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105 PSINet at 4; Sprint at 24; Comptel at 47; AT&T at 62-64; Ameritech at 26-32; and Bell South at 52-53.

106 Local Competition Order, ¶ 385.

cost allocation, interference, and new uses of the network element. In addition, endless legal arguments would be raised with respect to which entity may be forced to provide a service requested by a consumer, as well as difficulty policing practices designed to get a consumer to request a less desirable service from one or the other carrier.

Regardless of how the Commission comes out on this point, it is essential that, for the reasons given in Section III, above, an ILEC affiliate should never be permitted to share spectrum with the ILEC, since the possibility for a price squeeze and other anticompetitive actions would be too great under such a scenario.

VII. THE COMMISSION SHOULD ENTERTAIN ONLY LIMITED LATA BOUNDARY MODIFICATION REQUESTS, CONSISTENT WITH PRECEDENT.

As the Commission made clear in the Advanced Services Order, under Section 10(d) of the Act, 47 U.S.C. § 160(d), forbearance with respect to the Section 271 interLATA entry ban is not possible until a BOC has fully implemented Sections 251 and 271. 107/ The Commission made clear that the interLATA prohibition applies equally to data and voice traffic, and to advanced as well as existing interLATA services. 108/ The Commission also rejected the RBOCs' pleas

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107/ See also Advanced Services Order ¶¶ 69-79 (rejecting RBOC proposals to forbear on this and related requirements).

108/ Id. at ¶¶ 11-12, 35-36, 76-77, 82.

for wholesale LATA boundary revisions. 109/ The Commission correctly concluded that the "far-reaching and unprecedented relief [requested by the BOC petitioners] could effectively eviscerate section 271 and circumvent the procompetitive incentives for opening the local market to competition that Congress sought to achieve in enacting section 271 of the Act." 110/

In their comments on the NPRM, a number of RBOCs ignore these rulings completely, instead continuing to demand what would amount to wholesale exemptions from the interLATA ban for data services. 111/ They attempt to squeeze such requests into the "modification" framework set forth in Section 3(25)(B) of the Act, 47 U.S.C. § 153(25)(B), but they fail to make a convincing argument that the Commission's authority to "modify" LATA boundaries gives it the authority to create exemptions from the ban.

The Commission in the NPRM sought comment on whether and under what circumstances it can exercise its interLATA boundary modification authority to allow the RBOCs to provide interLATA high-speed data and other advanced services. Qwest supports the goal of broad and rapid deployment of broadband connections, particularly for libraries, schools, and educational institutions, and

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109/ Id. at ¶¶ 80-82.

110/ Id. at ¶ 82.

111/ See, e.g., Ameritech 62-69; Bell Atlantic 4-9; BellSouth 32-33; USTA 12-13.

Qwest has made many contributions to these goal already. 112/ But as most non-ILEC commenters argue, the Commission simply lacks the authority to use the LATA boundary modification authority to make significant changes in the RBOCs ability to provide interLATA services. 113/

These commenters also persuasively argue that public policy dictates that the Commission not expand the RBOC's interLATA authority significantly. CompTel, for example, points out that the limited interLATA relief discussed in the NPRM might give BOCs incentives to reduce their efforts to bring advanced services to schools and rural users, in order to create a pretext for LATA waivers. 114/ AT&T cogently argues that LATA boundary modifications should be allowed only if they strictly involve local service and do not in any way impede interexchange competition, consistent with the practice of both the MFJ court and the FCC to date. 115/ And MCI WorldCom correctly observes that the BOCs do not

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112/ Qwest Comments at 3-8. See also Initial Comments of Qwest (filed September 14, 1998) in Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, FCC 98-187, released August 7, 1998 ("Advanced Services NOI" or "NOI") at 13-16.

113/ See, e.g., AT&T 103-04; CompTel 50.

114/ CompTel at 48-52.

115/ AT&T 105-06.

need LATA boundary relief, because they already have a method to gain complete relief from interLATA restrictions -- compliance with the market-opening requirements of Sections 251(c) and 271. 116/

The Commission should discount the assertions of some RBOCs about the difficulties they experience due to the interLATA restriction. 117/ First, Congress gave them a natural way out: they can fully comply with their Section 251 obligations and obtain Section 271 interLATA entry authority by meeting the criteria of that section.

Second, as many parties correctly point out, the many existing interLATA networks can satisfy the existing demand for interLATA advanced services, including Internet backbone services, in almost every case, 118/ and therefore LATA boundary waivers beyond those that would meet the Commission's already established guidelines are generally unnecessary to assure consumers in rural areas access to Network Access Points. 119/ In the large majority of cases, IXCs and new entrants such as Qwest will be ready and willing to provide the

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116/ MCI WorldCom 81.

117/ See, e.g., BellSouth at 32-33, USTA at 12-13.

118/ See, e.g., AT&T 107-08; MCI WorldCom 80.

119/ See, e.g., Comptel at 51. See also Advanced Services Order ¶¶ 193-95.

desired services -- and of course BOCs may do so as well once they satisfy their Section 251 and 271 obligations to open their networks to competitors.

The RBOCs' complaint about not being able to provide "end-to-end" data services because of the interLATA prohibition is ironic, given the inability of its competitors to obtain last-mile high speed connections from the BOCs. BellSouth complains, for example, that

> every other actual or potential provider of advanced services capabilities . . . may provide their customers with end-to-end networking services regardless of geography, while the BOCs are required to hand off their high-bandwidth signals to other carriers at LATA borders. This regulatory restriction operates as a substantial competitive disadvantage to the BOCs vis-a-vis their many broadband competitors. 120/

BellSouth may not fully appreciate the irony in this statement. BellSouth would like to be able to deny competitors access to its advanced capabilities under Section 251(c). Yet it complains about its inability to provide "end-to-end service" -- an inability that evaporates as soon as BellSouth complies with the Section 271 checklist. 121/

120/ BellSouth at 32.

121/ As Qwest observed in its initial comments, many long distance network owners are ready and willing to lease capacity to the ILECs; the reverse, however, is not the case. Qwest at 70.

In sum, the Commission should simply continue to grant the type of LATA boundary waivers supported by existing precedent, and decline the RBOCs' pleas to be allowed to avoid satisfying the plain requirements of Sections 251 and 271 of the Act.

VIII. THE COMMISSION SHOULD AFFIRM THAT RESALE OBLIGATIONS APPLY TO ADVANCED SERVICES WHETHER OR NOT CLASSIFIED AS "EXCHANGE ACCESS".

The Commission got it right, both in the Advanced Services Order and in the tentative conclusions in the NPRM, where it proposed that resale obligations should apply to exchange access services that are provided to non-telecommunications carriers. 122/ Contrary to the mischaracterizations of some of the ILECs, 123/ the Commission did not propose to expand the scope of the existing 251(c)(4) resale requirement, but simply to clarify it.

Section 251(c)(4) is clear that the ILEC resale obligations apply to: (1) telecommunications services, that (2) are offered to subscribers that are not telecommunications carriers. There is no question that ILEC provided "advanced services" are telecommunications services, and that they are either telephone exchange or exchange access services. 124/ The key factual issue under Section

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122/ Advanced Services Order, ¶¶ 60-61, NPRM, ¶¶ 187-89.

123/ E.g., Bell Atlantic at 52.

124/ Advanced Services Order ¶ 35.

251(c)(4) is whether advanced services are offered primarily to end users or to telecommunications carriers. If the former is the case, then those services must be made available for resale at wholesale rates under Section 251(c)(4).

The ILECs who address this point concede that, to the extent such services are offered to parties other than retail residential and business customers, they are primarily offered to ISPs. 125/ A cursory scan of the ILECs' press releases regarding their xDSL offerings 126/ reveals that those services are to be offered largely to end users. 127/ And the Commission has already definitively classified ISPs as end users. 128/ To the extent advanced services can be described as

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125/ See, e.g., Bell Atlantic 53; US West 14, GTE 109-10.

126/ Those press releases are cited at Qwest 19-20 n.28.

127/ "Bell Atlantic today introduced Infospeed DSLsm service, making high-speed, packet-switched data connectivity, including Internet access, *an affordable and convenient option for consumers* in its eastern U.S. market." Bell Atlantic News Release, "Bell Atlantic Introduces Mass-Market DSL Service" (Oct. 5, 1998), available on the Internet at http://www.bell-atl.com/invest/news/adsl_release.htm (emphasis added).

128/ Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, FCC 98-67, ¶¶ 66-82 (released April 10, 1998). GTE's request for forbearance (GTE 110-11) is unsupported, runs directly contrary to the Commission's rejection of SBC's similar request in the Advanced Services Order (¶ 79), and is severely undercut by the fact that no ILEC in the country has "fully implemented" Section 251(c).

"exchange access," they are clearly subject to Section 251(c)(4) by its plain language if they are services offered to end users. 129/

CONCLUSION

For the reasons given, the Commission should (1) reject the ILECs' pleas to weaken the already weak Section 272 separate affiliate requirements, and instead adopt the stronger separation requirements proposed by Qwest in its initial

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129/ Qwest does not take a position here regarding whether and under what circumstances xDSL services are properly classified as "exchange access" services.

comments (assuming the Commission chooses to go the separate affiliate route at all); (2) adopt the network element and collocation proposals discussed herein and in Qwest's initial comments; and (3) make additional rulings consistent with the recommendations in Qwest's comments and reply comments.

Respectfully submitted,

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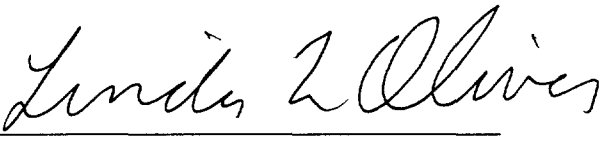
By: 

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I, Barbara E. Clocker, hereby certify that on this 16th day of October, 1998, a copy of the Reply Comments of Qwest Communications Corporation filed in CC Docket No. 98-147, was hand delivered to the parties listed below.

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